Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-815

WHITE PLAINS NURSING HOME, a partnership,

Petitioner,

— *against* —

COMMISSIONER OF THE DEPARTMENT OF HEALTH, STATE OF NEW YORK, and ASSISTANT COMMISSIONER OF THE DEPARTMENT OF HEALTH, STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COMMISSIONER OF THE DEPARTMENT OF HEALTH, STATE OF NEW YORK, and ASSISTANT COMMISSIONER OF THE DEPARTMENT OF HEALTH, STATE OF NEW YORK,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary

Respondents submit that the Court should not take jurisdiction of this case under 28 U.S.C., Sec. 1257(3), since the written decision of the Court of Appeals of the State of New York, rendered June 2, 1977 did not discuss petitioner's cross-appeal and the order of the Court of Appeals entered thereon can be sustained on State grounds.

The reasons asserted by petitioner for the granting of the writ are not adequate to warrant review in this case (Br., pp. 11-22).

Statement of the Case

This case arises out of a dispute between petitioner nursing home and respondents State officials over the determination made by such State officials adjusting downward the nursing home's prospective Medicaid reimbursement rate, including adjustments for Medicaid overpayments to the nursing home for prior years. The basis of the determination was that the lease upon which the nursing home had been receiving reimbursement and would be receiving reimbursement in the future was not arm's length.

White Plains Nursing Home is a partnership which has been operating a 240-bed nursing home in the County of Bronx, City and State of New York, since early 1972 and has been providing services to individuals receiving assistance under the New York State Plan for medical assistance under Title XIX of the Social Security Act (42 U.S.C., Sec. 1396a) pursuant to the Medicaid Provider Agreement (A-1).*

The nursing home leases the facility in which it provides services from the Cambridge Care Center Corporation pursuant to a written lease entered into on December 4, 1971 (R 38-76).** The lease provided for an annual rental of $444,000, which was orally modified to $432,000 (R 38, 85).

The provisions of the Public Health Law of the State of New York (Public Health Law, Sec. 2807[subd. 2]) require payments for nursing home services by governmental agencies to be made at rates approved by the New York State Director of the Budget. Prior to the approval of such rates, it is the responsibility of the respondent Commissioner of Health to determine and certify to the Director of the Budget that the proposed rates accord with the standard established by the statute, and the implementing regulations of the New York

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*Letter A refers to the Appendix hereto.

**Letter R refers to record on appeal in the New York Court of Appeals.

State Department of Health (10 NYCRR Part 86). Actual payment to the nursing home for services provided to eligible Medicaid recipients is made by local social services districts responsible for such recipients (New York State Social Services Law, Sec. 365).

Under the regulations of the Department of Health in effect at the times relevant to this proceeding (A-18 [10 NYCRR, Sec. 86.28]) nursing homes were reimbursed the actual cost of leasing facilities provided the transaction was arm's length. In the event the lease was not arm's length, the regulations provided that facility costs could be reimbursed based upon an imputed rental (A-18 [10 NYCRR, Sec. 86.30]).

From the opening of the White Plains Nursing Home in 1972 until February 1, 1975, the Medicaid reimbursement rates established for the home provided for full reimbursement of the rental cost fixed by the nursing home's lease with the Cambridge Care Center Corporation. On December 23, 1974, the Health Department wrote to the nursing home, informing it that it had come to the Health Department's attention that the lease between the nursing home and Cambridge Care Center Corporation was not at arm's length, and that effective February, 1975 the nursing home's Medicaid reimbursement rate would be adjusted to recover the overpayment for the period through January, 1975 (A-3). On January 27, 1975, the Health Department sent another letter to the nursing home informing it that its rate had been adjusted downward from the date of opening (A-4).

The basis for respondents' determination that the nursing home's lease was not at arm's length was in documents which revealed that one Anne Weiss Bergman was still a partner in the nursing home on March 15, 1972 (A-5) while her husband Bernard Bergman was an officer in the Cambridge Care Center Corporation (A-6, A-9). Petitioner admits that Anne Weiss Bergman was one of the original partners in the nursing home, and that Bernard Bergman owned all of the shares of stock in

Cambridge Care Center Corporation until sometime in 1969, and reacquired it in June, 1975 (R 85, 86).

Opinions Below

On or about May 27, 1975, the petitioner commenced a proceeding in the Supreme Court of the State of New York, County of Albany (hereinafter referred to as Special Term) seeking a judgment vacating and setting aside the respondents' determination reducing its Medicaid reimbursement rate (R 15). The Court at Special Term in an unreported decision (R 8) granted judgment to petitioner, entered in the Albany County Clerk's Office on October 9, 1975, which (1) annulled respondents' determination and remitted the matter to the Health Department for proper proceedings; (2) reinstated the "arm's length" Medicaid reimbursement rate; and (3) directed that all reimbursement withheld pursuant to the annulled determination be tendered forthwith to the nursing home (R 5, 8). The State respondents then appealed to the Appellate Division of the Supreme Court, Third Judicial Department. On July 1, 1976, the Appellate Division rendered its decision (53 A D 2d 926) holding that petitioner was entitled to a due process hearing with respect to its right to keep monies already paid, and a further hearing not limited to recoupment of past payments, to create an adequate record for review. The Appellate Division, without discussion, however, modified the judgment at Special Term by striking those provisions of the judgment at Special Term which reinstated the "arm's length" Medicaid reimbursement rate and directed that all reimbursement withheld pursuant to the annulled determination be tendered forthwith to the nursing home (R 96).

Thereafter petitioner and respondents cross-appealed to the Court of Appeals of the State of New York. In its decision, dated June 2, 1977, the Court of Appeals held that a hearing was appropriate under the circumstances of this case, and affirmed the order of the Appellate Division, Third Department,

without discussing the Appellate Division's modification of the judgment at Special Term (42 N Y 2d 838). On September 9, 1977, the Court of Appeals denied, without opinion, petitioner's motion for reargument made on the grounds that the Court of Appeals had overlooked or misapprehended its cross-appeal (42 N Y 2d 1015).

REASONS FOR DENYING CERTIORARI

A.

This Court should not take jurisdiction of this case under 28 U.S.C., Sec. 1257(3), since the decision of the New York Court of Appeals with respect to petitioner's cross-appeal could have rested on State grounds.

In *Stembridge* v. *Georgia* (343 U.S. 541, 547 [1951]) this Court held:

> "[w]here the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review."

The Court of Appeals in this case could have decided that the petitioner was not entitled to the relief requested on its cross-appeal, because the officials who are authorized by State law to provide such relief were not parties to this proceeding and, therefore, not subject to the jurisdiction of the Court.

Petitioner on its cross-appeal to the Court of Appeals was seeking to have the order of the Appellate Division striking provisions of the judgment at Special Term modified, and the entire judgment of Special Term affirmed. Those provisions of the judgment which had been stricken by the Appellate Division reinstated the Medicaid reimbursement rate which had previously existed, and directed that all reimbursement withheld pursuant to the subsequent rate determination be tendered forthwith to the nursing home (R 96).

In the Health Department's brief in the Appellate Division, Third Department, the Department contended that although the Commissioner of Health has responsibility under subdivision 3 of section 2807 of the Public Health Law to certify Medicaid reimbursement rates to the State Director of the Budget, the Commissioner of Health does not have authority to make such payments. Pursuant to sections 365 and 367-a of the Social Services Law, local social services districts under the supervision of the New York State Department of Social Services, are responsible for furnishing and paying for medical care and service provided to eligible persons under the Medicaid program. The Department contended, therefore, that the Court at Special Term had erred in ordering it to tender forthwith to the nursing home payments over which they had no control and which they do not have authority to make under State law.

The same argument was made by the Department during oral argument before the Court of Appeals, and on petitioner's motion to reargue in the Court of Appeals.

Furthermore, under New York State law, the New York State Director of the Budget must approve rates determined and certified by the Commissioner of Health, and no governmental agency is permitted by law to make payment for nursing home services unless the reimbursement rate is so approved (A-16 [Public Health Law, Sec. 2807(3)]).

The Court of Appeals, therefore, properly rejected petitioner's cross-appeal because under State law the Commissioner of Health does not have legal authority or funds to make payment directly to the nursing home, or to reinstate reimbursement rates without the approval of the Director of the Budget.

B.

Petitioner argues that the decision of the New York Court of Appeals is inconsistent with prior decisions of this Court and, by granting certiorari, this Court would be able to resolve issues left open as a result of the application of the flexible due process standard in *Mathews* v. *Eldridge* (424 U.S. 319 [1976]).

Although it is the Department's position that there are adequate State grounds to support the decision of the Court of Appeals with respect to petitioner's cross-appeal, we submit that there is no inconsistency on Federal grounds between the decision of the Court of Appeals and prior decisions of this Court.

In *Mathews* v. *Eldridge (supra* at page 334) this Court reiterated and emphasized that due process is not an inflexible doctrine with a fixed content unrelated to time, place and circumstances. Due process calls for such procedural protections as the particular situation demands.

In the case at bar, the New York Court of Appeals held that a hearing is appropriate to resolve the factual dispute regarding reductions of the Medicaid reimbursement rate to recoup alleged overpayments already authorized and received by the nursing home. Since, the respondents were public administrators presumed to be acting in the public interest, were experienced in the field of nursing home administration, had documentary evidence before them, and the amount of reduction in the nursing home's Medicaid reimbursement rate was less than 9% of the nursing home's daily and monthly rate, the doctrine of flexible due process as reiterated in *Mathews* v. *Eldridge (supra)* did not require the Court of Appeals to hold that before a hearing was held the nursing home's prior rate should be reinstated, and the money previously withheld be tendered forthwith (*cf. Haverhill Manor, Inc.* v. *Commissioner of Public Welfare*, 330 N.E. 2d 180, 188 [1975], cert. den. 423 U.S. 929).

Furthermore, the case at bar does not present, as argued by petitioner, issues which will serve to "clarify" *Eldridge*, since that case calls for a flexible due process standard. Petitioner would have this Court "clarify" *Eldridge* by adopting precise standards which would limit the flexible standards by which due process is measured by Federal and State courts and allows them to consider due process questions under the Fifth and Fourteenth Amendments to the United States Constitution in

a meaningful manner within the context of the particular cases before them, rather than through adherence to rigid standards which do not and cannot relate to all cases. The decisions of the New York Court of Appeals and the Appellate Division, within the circumstances of this particular case, do not conflict with *Eldridge* and do not suggest that this Court needs to clarify its decision.

As indicated by petitioner (Br., pp. 8, 9) after the rate determination which is the subject of this case, the Department of Health adopted a new regulation with regard to Medicaid reimbursement for leased property. The new regulation led to a second reduction in petitioner's Medicaid reimbursement rate based upon the nature of the nursing home's lease with its landlord. Petitioner then commenced a second lawsuit against the respondents. On December 29, 1977, the Supreme Court of the State of New York, Appellate Division, Third Department, ruled in the second case that petitioner should be restored to the arm's length rental rate effective January 1, 1976 and that a hearing be conducted forthwith as to the nature of its lease (A-13; __A D 2d __).

No order has as yet been served by the petitioner on the respondent New York State Commissioner of Health in that case. Although no decision has been made by respondents on whether to appeal, if an appeal is taken petitioner may move to vacate the State's statutory stay of the order appealed from (Civil Practice Law and Rules, Sec. 5519 [subd. c]). Petitioner is, therefore, not without judicial remedy under New York law until the appeals process is completed as started by the petitioner (Br., p. 13).

The reasons given by petitioner do not warrant granting petitioner's writ of certiorari.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
January 19, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

CLIFFORD A. ROYAEL
Associate Attorney

of Counsel

APPENDIX

MEDICAID PROVIDER AGREEMENT.

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES MEDICAID PROVIDER AGREEMENT

(FULL COMPLIANCE)

The undersigned, certified by the Secretary of the Department of Health, Education, and Welfare, as eligible for Title XIX (Medicaid) agreement, shall be subject to the same terms and conditions and coterminous with the approval of eligibility as specified by the Secretary pursuant to Title XVIII, for a TWELVE-month term as being in full compliance with the standards of a "Skilled Nursing Home" as defined in Part 249 of Title 45 of the Code of Federal Regulations, in consideration of receiving payments for services provided to individuals receiving assistance under the New York State Plan for Medical Assistance pursuant to Title XIX of the Social Security Act, hereby agree(s) as follows:

a. **To keep such records as are necessary fully to disclose the extent of the services provided to such individuals receiving assistance under the said plan and**

b. **To furnish the New York State Department of Social Services with such information regarding any payments claimed by the nursing home for providing such services as the Department may from time to time request and**

c. **To insure that established written policies and practices governing admission and retention of patients within the facility reflect full compliance with regard to the provisions of Title VI of the Civil Rights Act of 1964 and additionally do not discriminate as to source of payment in admission and retention of patients in said facility.**

This agreement shall continue in effect for the term indicated below and no longer, so long as the nursing home continues to be certified by the New York State Department of Health as

MEDICAID PROVIDER AGREEMENT.

being in full compliance with the standards of a "skilled nursing home" as defined in Part 249 of Title 45 of the Code of Federal Regulations and so long as the nursing home continues to provide services in accordance with applicable provisions of the Social Services Law of the State of New York, the Public Health Law, the rules and regulations of the Department of Social Services and the requirements of the State Hospital Code.

This coterminous agreement is not transferable or assignable.

Nothing herein shall be construed to limit or alter any contract between the undersigned and any State or Federal agency.

Effective Date: January 1, 1975

Expiration Date: December 31, 1975

Termination of your Title XVIII certification, by reason of non-compliance with the uniform conditions of participation, or voluntary withdrawal from Title XVIII will nullify your Title XIX Provider Agreement, effective the date of such termination or withdrawal.

EDP Identification No. 645

(240 beds)

Mr. Samuel Barry
Administrator
White Plains Nursing Home
3845 Carpenter Avenue
Bronx, New York 10467
Name and Address of Nursing Home

s/ Samuel Barry (Administrator)
Authorized Signature

Date: 2-26-75

Receipt acknowledged for the New York State Department of Social Services
by: (illegible) 3 March, 1975
Name Date

N.Y.S. DEPARTMENT OF HEALTH LETTER, dated 12-23-74.

December 23, 1974

Mr. Mark A. Loren
White Plains Nursing Home
3845 Carpenter Avenue
Bronx, New York 10467

Dear Mr. Loren:

It has been brought to my attention that the lease between you and the Cambridge Care Center is not an arms-length lease. According to our reimbursement rules the rent should be limited to the non-arms length rental from the date of opening.

Effective in the February 1975 rate an adjustment will be made to recover the over-payment for the period through January 1975.

Very truly yours,

William F. McCann
Assistant Commisioner
Division of Health Economics

EW/tl

A-4

N.Y.S. DEPARTMENT OF HEALTH LETTER, 1-27-75.

HOLLIS S. INGRAHAM, M.D.
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF HEALTH
84 HOLLAND AVENUE
ALBANY, N. Y., 12208

DIVISION OF
HEALTH ECONOMICS

WILLIAM F. MC CANN
ASSISTANT COMMISSIONER

DONALD B. DAVIDOFF
ASSOCIATE DIRECTOR

January 27, 1975

Mr. Mark A. Loren
White Plains Nursing Home
3845 Carpenter Avenue
Bronx, New York 10467

Dear Mr. Loren:

In accordance with our letter to you dated December 23, 1974, your rate has been adjusted effective from the date of opening.

	From	To
Daily	$ 48.38	$ 44.35
Monthly	1,472.00	1,349.00

The revised rate is effective for the period February 1, 1975 through December 31, 1975 and includes an adjustment for the years 1972, 1973, 1974 and for January of 1975. The cost of prescription drugs and therapy are included in your rate.

Very truly yours,

s/ William F. McCann

William F. McCann
Assistant Commissioner
Division of Health Economics

A-5

NURSING HOME LETTER, dated 3-15-72.

WHITE PLAINS NURSING HOME
3845 CARPENTER AVENUE
BRONX, NEW YORK 10467
212-547-2006

March 15, 1972

Commissioner Florence Kavaler, M.D.
Asst. Commissioner for Evaluation
& Institutional Reviews
New York City Dept. of Health
125 Worth Street - Room 338
New York, N.Y. 10013

Re: White Plains Nursing Home
Carpenter Avenue
Bronx, N.Y.

Dear Dr. Kavaler:

The undersigned Bernard Izbicki, Mark A. Loren and Anne Weiss Bergman are the original licensees for the above facility.

This will confirm that no person other than the aforementioned individuals will receive any pecuniary benefit from or incur any losses in connection with said facility.

s/ Bernard Izbicki
Bernard Izbicki

s/ Mark A. Loren
Mark A. Loren

s/ Anne Weiss Bergman
Anne Weiss Bergman

s/ Stephen A. Reiss

STEPHEN A. REISS
Notary Public, State of New York
No. (illegible)
Qualified in County Rockland
Commission expires 3/31/73

DUN & BRADSTREET REPORT, dated 6-27-74.

DUN & BRADSTREET, INC.

BASE REPORT

sic	d-u-n-s	started	rating
2 51	CD 001 JUN 27 1974		

TOWERS NURSING HOME — NURSING HOME
1957 — ER3

250 S 57TH ST
ALSO: BRANCHES
NEW YORK NY 10019 — SUMMARY
TEL 212 865-8800

ANNE WEISS (MRS. BERNARD) BERGMAN, PARTNER
SISSEL (MRS. SAMUEL) KLURMAN, PARTNER
JACK STERN, ADM

PAYMENTS	UNDETERMINED
SALES	$3,500,000
EMPLOYS	210
RECORD	INCOMPLETE

PAYMENTS — Contacted three local suppliers during current investigation; no results received.

FINANCE — On Jun 27 1974 Jack Stern, Administrator, declined financial statement.

Annual sales $3,500,000.

Public records disclosed the following financing statement with the subject as debtor and Basic Leasing Corp., 37-21 12th Street, Long Island City, NY, as the secured party. Entered Jul 5, 1973, file No. 61,020, Collateral: (1) One Kold Draft Ice Cube Machine, Model No. GB5UN3 complete with a storage bin, model No. GBN-2.

DUN & BRADSTREET REPORT, dated 6-27-74.

Public records also disclose the following judgments against the subject in the amounts of $40,000 and $7,500, both dated Mar 26 1974 and filed in New York County with B. Braunstein, et al, Trustees Pension Fund as the Plaintiffs.

A check for current status on all the above presently underway.

BANKING — Balances average low five figures. Non-borrowing account. A satisfactory account maintained.

HISTORY — Trade style originally registered during 1957 by Anne Weiss and another re-registered by present partners and one Alex S. Ferro Jan 15, 1968. Re-registered by present partnes Dec 10, 1970.

ANNE BERGMAN, reportedly using her maiden name for business activities, born 1918. Reportedly associated with husband in various affiliated entities and prior to 1955 was partner with her husband in Mayflower Nursing Home, 601 West End Avenue, this City. Also owner Kingsby Realty Co.

Kingsby Realty Co., the caption address, chartered 1965. Holds title to Willoughby Nursing Home, 949 Willoughby Avenue, Brooklyn, NY, a 210 bed nursing home, reportedly operated by others. Financial details not furnished.

DR. BERNARD BERGMAN, married, born 1911. Received a Doctorate in Divinity from the New York University (Rabbi), however, for the past 25 years has been active principally in the real estate, and construction field, primarily in the acquisition, construction, ownership and operation of nursing homes. For three years was editor and Chief Jewish Morning Journal (now defunct). He is an officer in numerous real estate entities, described later.

On Apr 30, 1968, balance sheet on Dr. and Mrs. Bernard Bergman, showed, total assets $2,322,027, total liabilities of $185,000 and net worth of $8,137,027. Assets included: Cash in bank $84,419, marketable stocks and bonds $105,000, real estate equity at cost $838,258, also investments in related entities, at $4,911,000, partnership interest $965,000. These assets do not include approximately 185,000 shares (one-third) interest) of Medic-Home Developers Inc., acquired Jun 1968.

Bergman is an officer in the following:

National Hospital & Institutional Builders Corp., this address, Chartered New York Dec 1965. Formed to construct and operate nursing homes. Bernard Bergman, President. May 15, 1969 balance sheet showed: total assets $2,239,000: worth $1,850,000.

Roosevelt Towers Co. Inc., this address. Partnership of Bergman and another formed 1964. Constructed 33-story 420 unit apartment house west New York, NJ.

Institutional Builders Corp., this address, Chartered New York 1953, general contractors, constructed 120 bed nursing home at Elizabeth, NJ. Bergman Vice President. Institutional Builders Corp., on the project functioned as general contractors for Elizabeth Nursing Home for Dr. Bernard Bergman, principal.

Kuhl Towers Construction Corp., chartered New Jersey Dec 1963 to construct apartment house at West New York, NJ.

Medic-Home Enterprises Inc., 1700 Broadway, Bergman, Director, was incorporated as Washington Holding Corp, New York Oct 1964, Jan 1968 pursuant to plan of recapitalization under amendment to the certificate of incorporation, name changed by charter amendment to Medic-Home Enterprises Inc. Active as a holding company, holding capital stock of subsidiaries and through subsidiaries, owns, develops and lease nursing homes and related facilities, providing self care units

and apartments for the elderly. Sep 1970 consolidated financial statement showed worth $3,709,291.

Oceanside Holding Corp., Chartered New York 1963. Formed to operate 180 bed nursing home on Lincoln Avenue and Atlantic Avenue, Oceanside, Long Island.

Geriatric Construction Corp., formed to construct the University Nursing Home, Silver Springs, MD.

Bergman reportedly holds leasehold, Oxford Nursing Home, 148 South Oxford Street, Brooklyn, NY.

Sameth Realty Corp., real estate records show property located at 309-11 West 86th Street, New York, NY., consisting of a 12-story apartment is in the name of Sameth Realty Corp., with Bernard Bergman, President, in care of Anne Bergman, 280 Riverside Drive, purchased Jul 10, 1953. Assessment 1967-1968 $290,000.

Institutional Builders Inc., will operate 150 bed nursing home, Rockville, MD nursing home to be constructed by affiliate, Rockville, Md.

Elizabeth Nursing Home Inc., this address, chartered New Jersey property at 456 Ranway, Elizabeth, NJ, at which point Elizabeth Nursing Home is located.

Cambridge Care Center Corp., chartered New York, about May 1968, Bergman President. Formed to operate a 240 bed nursing home at 3545 Carpenter Avenue, Bronx, NY. 6-story structure occupying approximately 46,000 square feet.

Kennedy Towers Inc., engaged in the construction of 120 Bed nursing home, Wayne, NJ. to be completed 1959, Bergman, President.

Fredericksburg Nursing Home, proprietorship of Bergman, Fredericksburg, VA. Operates 110-bed nursing home completed Aug 1968 and opened in Sep of same year.

Verrazano Nursing Home, operates nursing home opposite hospital, Staten Islands, NY.

Queens Care Center Corp., will operate 200 bed nursing home now under construction by affiliate. Corona Avenue, Queens, NY, known as Corona Ave Nursing Home.

Riverside 87th Corp., formed to operate 520 bed nursing home at 150 Riverside Drive, known as Park Crescent Nursing Home, now being rehabilitated by affiliate.

Targee Care Center Corp., will operate 240 bed nursing home located at Danube Avenue, corner of Targee Street, Staten Island, NY known as Danube Nursing Home, being constructed by affiliate.

Willowbrook Care Center Corp., will operate 40 bed nursing home Laconia Aenue, Bronx, NY, known as Laconia Nursing Home, in process of being constructed.

Twin Oaks Nursing Home Inc., subsidiary of National Hospital & Institutional Builders Corp., this address, reportedly chartered Florida 1969, Bergman, President. Formed to operate 160 bed nursing home, Tampa, FL.

Technico Construction Corp., this address, Bergman, President, Reportedly chartered New York Sep 1970, Functions as general contractor, latterly exclusively for affiliated entities in construction of nursing home.

Over the years, Bergman, has been a principal in a number of entities including West Park Realty Co, Inc., formed to hold leasehold to nursing home at 2 West 105th Street, Willoughby Nursing Home, 949 Willoughby Avenue, Brooklyn, NY Bushwick Nursing Home, 1032 Putnam Avenue, Brooklyn Belt Parkway, Booklyn Nursing Home, style registered 1955, Maril Holding Corp., chartered 1954, real estate holding company, formed to hold title to property at 1882 83rd Street, Brooklyn, NY, occupied by Belt Parkway Nursing Home, Hatelmund Inc., chartered 1958, publishers Malmudic Books. Also details as to current status of some of these homes not currently determined. However, according to Apr 30 1968 statement on individual holdings of Bergman his investments include the following:

Washington Holding Corp., (now Medic Home Enterprises Inc) 33 1/3% owned, Palms Convalescent Home, 50% owned, Irving Nursing Home Inc., 66 2/3% owned, Irvington Guest House Inc., 66 2/3% owned, Riverside 87th St. Corp., 75% owned, Kingsby Realty Corp., 100% owned, Roosevelt Tower Co., 100% owned, Samath Realty Corp., 65% owned, Utica Nursing Home Inc., 60% owned and Kennedy Towers Inc., 75% owned. Also has partnership interest 20% in Colt Park Associates, 15% in the LaFrance Associates and 95% in Oxford Nursing Home Ltd.

KLURMA, Wife of Samuel, born 1922, since 1964, President and Chief Operting officer of Medic Home Enterprises Inc., previously described. Prior to that time was President of National Growth Corp., Denver, CO, a corporation principally engaged in the construction field. With wife also reportedly active in Liberty Nursing Home, Virginia.

STERN, Administrator since 1971 Prior to that reportedly employed same field. Details not determined.

OPERATION Operates nursing home as lessee, Towers Nursing Home, 2 West 106th Street, New York, NY. Has accommodations for 360 persons. About 210 employed. Prices per day per patient $25-30. LOCATION: At the caption address shares quarters with numerous affiliates of Bernard Begman, multi-story structure Westside Manhatten.

DUN & BRADSTREET REPORT, dated 6-27-74.

At 2 West 106th Street, occupies 5-story miscellaneous building, westside upper Manhatten.

07-05 (268 -7 B344R5) T75
I 9064 P 9104 -2
D 9

DECISION, WHITE PLAINS v. WHALEN, dated 12-29-77.

Supreme Court — Appellate Division
Third Judicial Department

December 29, 1977 31103

In the Matter of WHITE PLAINS NURSING HOME,
Respondent-Appellant,

v.

ROBERT P. WHALEN, as Commissioner of the Department of Health of the State of New York, et al., Appellants-Respondents.

Cross appeals from a judgment of the Supreme Court at Special Term, entered June 8, 1976 in Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to the extent of directing respondents to reinstate petitioner's imputed rental Medicaid reimbursement rate as of January 12, 1976 pending a determination of this court of a separate related proceeding and adjudged Department of Health Regulation 10 NYCRR 86.30 to be lawful and to constitute a reasonable exercise of authority by the Commissioner of Health.

Petitioner is a partnership operating a nursing home wherein services are provided to individuals receiving assistance under the New York State Plan for medical assistance pursuant to title XIX of the Social Security Act, i.e., the Medicaid program. Not owning its own physical plant, petitioner rents from Cambridge Care Center Corporation a premises in the Bronx, New York, in which it operates its nursing home facility. On January 12, 1976, respondents determined to completely eliminate, as of January 1, 1976, the realty reimbursement which petitioner was then receiving under the Medicaid program for its facility because of petitioner's failure to submit to respondents "approved property costs" for the facility as required by 10 NYCRR 86.30. Alleging that, as lessee of the premises, the

requested information relative to costs was unavailable to it and that, consequently, it could not comply with 10 NYCRR 86.30 and submit the information to respondents, petitioner thereafter commenced the instant proceeding wherein it seeks a declaration that 10 NYCRR 86.30 is invalid and the annulment of the determination eliminating its realty reimbursement. Special Term ultimately ruled that the challenged regulation was not invalid, but nonetheless also directed the reinstatement, as of January 12, 1976, of petitioner's imputed rental reimbursement rate, i.e., the rate formerly applicable when the lease involved was not an arms length transaction, pending a determination in this court of a separate related proceeding in which petitioner was appealing an earlier reduction in its reimbursement from the arms length rate to the imputed rental rate. These appeals ensued.

Prefatory to our reaching the merits of these appeals, we initially note that administrative rate-making is the central issue in this case. Accordingly, in the exercise of our discretionary power, we hereby convert this article 78 proceeding into one for a declaratory judgment (CPLR 103, subd. [c]; *Matter of Broadacres Skilled Nursing Facility* v. *Ingraham*, 51 A D 2d 243).

Turning now to the substantive issues raised herein, we find it most significant that the present total elimination of petitioner's realty reimbursement and the earlier reduction therein to the imputed rental rate were both premised solely upon the *ex parte* determination of respondents that petitioner was operating under a lease that was not an arms length transaction. Since the rendering of the judgment appealed from in this case, however, decisions have been reached in both this court and the Court of Appeals relative to petitioner's appeal of the earlier *ex parte* reduction in its reimbursement rate. It has been finally determined that respondents' resolution of the factual issue as

to the nature of petitioner's lease, i.e., that it was not an arms length transaction, was improperly made as it was made without the holding of a hearing (*Matter of White Plains Nursing Home* v. *Whalen*, 53 A D 2d 926, affd. 42 N Y 2d 838). Such being the case, there is no basis for respondents' total elimination of petitioner's reimbursement, it necessarily follows that petitioner must be restored to the reimbursement rate for the arms length lease until the conduct of a hearing.

In so ruling, we would emphasize that our ordering the immediate resumption of reimbursement to petitioner is particularly appropriate in this instance because the record establishes that it has been without any reimbursement and awaiting a hearing since January of 1976 and that its resultant financial difficulties would likely necessitate the closing of the nursing home absent temporary financial relief pending a hearing. Moreover, the effective date for the resumption of reimbursement should be January 1, 1976, the date of the total elimination thereof, rather than January 12, 1976 as determined by Special Term.

Finally, we do not reach the question of the validity of 10 NYCRR 86.30 because it has been superseded by a new regulation effective January 1, 1976 (see 10 NYCRR 86-2.21) and, as such, would be inapplicable to petitioner's situation even should it eventually be determined that the lease in question was not an arms length agreement.

Judgment modified, on the law, without costs, by directing that petitioner be restored to the arms length rental rate effective January 1, 1976, and that a hearing be conducted forthwith as to the nature of its lease, and, as so modified, affirmed, without costs.

KANE, J. P., MAHONEY, MAIN, LARKIN and MIKOLL, JJ., concur.

N.Y. PUBLIC HEALTH LAW, SEC. 2807.

Public Health Law, Sec. 2807, subdivisions 1, 2, 3:*

"Sec. 2807. Payments for hospital and health-related service

"1. No government agency and no corporation organized and operating in accordance with article nine-c of the insurance law shall purchase, pay for or make reimbursement or grants-in-aid for any hospital or health-related service, including home health service, unless, at the time the service was provided, the hospital possessed a valid operating certificate authorizing such service or in the case of a home health agency a valid certificate of approval.

"2. Payments for hospital service and health-related service, including home health service, made by the government agencies or corporations organized and operating in accordance with article nine-c of the insurance law shall be at rates approved by the state director of the budget in the case of government agencies and approved by the superintendent of insurance in the case of corporations organized and operating under article nine-c of the insurance law. * * *

"3. Prior to the approval of such rates, the commissioner shall determine and certify to the superintendent of insurance and the state director of the budget that the proposed rate schedules for payments for hospital and health-related service, including home health service, are reasonably related to the costs of efficient production of such service.* * *"

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* (As in effect January 27, 1975.)

N.Y. SOCIAL SERVICES LAW, SEC. 365 (subd. 1).

Sec. 365. Responsibility for assistance

1. Subject to supervision by the department: (a) Each public welfare district shall furnish medical assistance to the persons eligible therefor who reside in its territory, except to persons for whom another public welfare district would be responsible under the provisions of paragraphs (b), (c) or (d) of subdivision five of section sixty-two and other provisions of this chapter, and except to persons for whom provision is made hereinafter in subdivision two. Temporary absence, within or without the state, of such persons from such territory shall not affect their eligibility for such assistance;

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10 NYCRR, Sections 86.28 and 86.30.

Regulations of the State
Department of Health Involved

10 NYCRR Part 86 — "Reporting and Rate Certification for Medical Facilities" provides in pertinent part:

Section 86.28 Costs of related organizations.

"(a) Costs applicable to services, facilities and supplies furnished to the medical facility by organizations related to the provider by common ownership or control are includable in the computation of the basic rate at the cost to the related organization.

"(b) If the provider has any interest whatsoever in the related organization, the final payment rate will include both the costs of the related organization in providing the services, facilities and supplies and a return on the equity capital of the related organization."

*Section 86.30 Temporary rental allowance; proprietary nursing homes. "Within the rate of payment for proprietary nursing homes an amount may be included as an allowable cost as 'imputed rental' in the computation of the rule of payment. This amount, if included, is in lieu of depreciation, interest on capital indebtedness, insurance on property and return on investment in real estate and nonmovable equipment."

* (As in effect January 27, 1975.)